

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

TAG IRA, LLC,

Plaintiff,

vs.

Case No. 2014-659-CB

RESIDENTIAL GROUP 231, LLC, PROPERTY
SOLUTIONS OF MICHIGAN, INC., ALLEN
BOIKE, and STEVEN E. LONDEAU, JR.,

Defendants.

OPINION AND ORDER

Plaintiff has filed a motion for entry of judgment as to Defendants Steven E. Londeau Jr. (“Defendant Londeau”) and Property Solutions of Michigan, LLC (“Property Solutions”), and Allen Boike (“Defendant Boike”).

Defendants have filed responses to the motion and request that the motion be denied.

Facts and Procedural History

In early 2011, Defendant Boike, allegedly on behalf of Defendant PSOM, contacted Plaintiff’s agent attempting to solicit an investment in a pool of securities that Defendant PSOM was seeking to purchase. Plaintiff declined the offer but agreed to extend a short term loan of \$200,000.00 to enable the purchase.

On August 26, 2011, a promissory note was issued by Defendant Residential Group 231, LLC (“Defendant 231”) in favor of Plaintiff in the amount of \$200,000.00 (“First Note”). None of the other Defendants are named in the First Note. Defendant 231 ultimately defaulted on the terms of the First Note.

On February 21, 2012, Plaintiff sent a written notice of default to Defendant 231 and Defendant PSOM. On March 2, 2012, in order to stop collection efforts, a promissory note was executed between Defendant PSOM and Plaintiff, in which Defendants Boike and Londeau allegedly personally guaranteed the loan amount due and owing ("Second Note"). While two payments were made pursuant to the Second Note totaling \$106,000.00, PSOM ultimately defaulted on the terms of the Second Note.

On February 20, 2014, Plaintiff filed its complaint in this matter alleging claims for: breach of contract (Count I), breach of implied contract (Count II), quantum meruit (Count III), promissory estoppel (Count IV), fraud (Count V), and conversion (Count VI).

On August 21, 2014, Plaintiff filed its motion for partial summary disposition. Defendants PSOM and Boike have filed a joint response. Defendant Londeau has filed an individual response. In addition, Plaintiff has filed a reply in support of its motion.

On October 3, 2014, the Court entered its Opinion and Order granting, in part, and denying, in part, Plaintiff's motion. Specifically, the Court dismissed Plaintiff's account stated claim, granted the remainder of Plaintiff's motion with respect to Property Solutions and Defendant Londeau, and denied Plaintiff's motion as to Defendant Boike pending an evidentiary hearing on his defense related to his signature stamp.

On November 24, 2014, Plaintiff filed its instant motion for entry of judgment as to Defendant Londeau and Property Solutions. On December 1, 2014, the Court held a hearing in connection with the motion. At the hearing, Defendant Londeau and Property Solutions objected to Plaintiff's motion and requested an evidentiary hearing. The Court granted Defendants' request and set the matter for an evidentiary hearing on December 22, 2014. Additionally, the

Court advised the parties that the evidentiary hearing would also address the merits of Defendant Boike's defense.

On December 22, 2014, the Court held a hearing in connection with the instant motion. Due to Plaintiff's failure to provide detailed billing records prior to the hearing, the Court adjourned the portion of the evidentiary hearing related to Plaintiff's motion for entry of judgment. However, the parties proceeded with the issue of Defendant Boike's defense. At the conclusion of the hearing, the Court took that matter under advisement. On February 3, 2015, the Court entered its Opinion and Order granting Plaintiff's motion for summary disposition of its breach of contract claim against Defendant Boike.

On February 9, 2015, the Court held a hearing in connection with Plaintiff's motion for entry of judgment. At the conclusion of the hearing, the Court took the matter under advisement and instructed the parties to file supplemental briefs in support of their positions. The parties have filed briefs as instructed.

Arguments and Analysis

As a preliminary matter, Defendants contend that the portion of Plaintiff's motion seeking attorney fees incurred in connection with Residential Group 231, LLC's bankruptcy should be denied.

In response, Plaintiff asserts that such fees and costs, as well as the other attorney fees and costs incurred in connection with the present matter, are recoverable under paragraph 9 of the Second Note. Paragraph 9 provides:

[Defendant PSOM] agrees to pay the following costs, expenses, and attorney fees paid or incurred by [Plaintiff], or adjudged by a court: (a) reasonable costs of collection and costs, expenses, and attorney fees paid or incurred in connection with the collection or enforcement of this Note, whether or not a suit is filed (b) reasonable costs, expenses, and attorney fees paid or incurred in connection with representing [Plaintiff] in any bankruptcy, reorganization, receivership, or other

proceedings affecting creditors' rights involving a claim under this Note; (c) reasonable costs, expenses, and attorney fees incurred to protect the lien of the assets pledged in the Pledge Agreement; and (d) costs of suit and such sum as the court may adjudge as attorney fees in any action to enforce payment of this Note or any part of it.

Plaintiff asserts that subsection (b) permits it to recover the attorney fees and costs it incurred in connection with Defendant 231's bankruptcy. However, the Court is convinced that Defendant 231's bankruptcy did not affect Plaintiff's rights with respect to the Second Note. Defendant 231 is not a party to the Second Note; rather, the only parties to the Second Note, excluding guarantors, are Defendant PSOM and Plaintiff. While Plaintiff may have sought to protect its interest in the First Note by filing a claim in connection with Defendant 231's bankruptcy, the Court is convinced that such efforts, as well as any settlement in connection with such efforts, does not affect Plaintiff's rights under the Second Note. Consequently, Plaintiff may not recover the attorney fees and costs it incurred in connection with Defendant 231's bankruptcy.

The remainder of the Plaintiff's motion seeks to recover the costs and attorney fees it has incurred in connection with this matter. The party requesting attorney fees bears the burden of proving they were incurred and that they are reasonable. *Reed v Reed*, 265 Mich App 131, 165-166; 693 NW2d 825 (2005). The procedure for determining whether the fees requested is reasonable was set forth in *Smith v Khouri*, 481 Mich 519, 537; 751 NW2d 472 (2008) and clarified by the Michigan Court of Appeals in *Van Elslander v Thomas Sebold & Associates, Inc.*, 297 Mich App 204; -- NW2d -- (2012). In *Van Elslander*, the Court, in relying on *Smith*, held:

It is incumbent on the trial court "to consider the totality of special circumstances applicable to the case at hand." Citing the factors elucidated in *Wood v. Detroit Automobile Inter-Ins. Exch.*, 413 Mich 573, 321 N.W.2d 653 (1982), the *Smith* Court identified six factors to be considered in determining a reasonable attorney fee:

(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.

The Court also recognized the following eight factors delineated in the Michigan Rules of Professional Conduct (MRPC) 1.5(a), noting an overlap with *Wood*:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

The Court further recognized the value of data available in surveys such as the Economics of the Law Practice Surveys, as routinely compiled by the State Bar of Michigan.

Van Elslander, supra, at 10.

Specifically, the Court, citing *Smith*, held that the trial court should utilize the above-referenced factors in the following manner:

[A] trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that having the trial court consider these two factors first will lead to greater consistency in awards. Thereafter, the court should consider the remaining *Wood* /MRPC factors to determine whether an up or down adjustment is appropriate. And, in order to

aid appellate review, a trial court should briefly discuss its view of the remaining factors.

Van Elslander, supra, at 10.

Accordingly, the first task before this Court is to determine the fee customarily charged in Macomb County for similar legal services. *Id.*

1) *Fee Customarily Charged*

In this matter, Plaintiff requests that the Court award Jay A. Abramson, Joanna S. Abramson, and Johnathan L. Zadoff \$275.00 per hour for the legal services they provided in connection with this matter.

In *Van Elslander*, the Court provided the following procedure for determining the fee customarily charged:

The reasonable hourly rate represents the fee customarily charged in the locality for similar legal services, which is reflected by the market rate for the attorney's work. "The market rate is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question." We emphasize that "the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." The fees customarily charged in the locality for similar legal services can be established by testimony or empirical data found in surveys and other reliable reports. But we caution that the fee applicant must present something more than anecdotal statements to establish the customary fee for the locality. Both the parties and the trial courts of this state should avail themselves of the most relevant available data. For example, as noted earlier, in this case defendant submitted an article from the Michigan Bar Journal regarding the economic status of attorneys in Michigan. By recognizing the importance of such data, we note that the State Bar of Michigan, as well as other private entities, can provide a valuable service by regularly publishing studies on the prevailing market rates for legal services in this state. We also note that the benefit of such studies would be magnified by more specific data relevant to variations in locality, experience, and practice area.

Van Elslander, supra, at 11.

In support of its request, Plaintiff has provided, and relied upon, the 2014 Economics of Law Practice Attorney Income and Billing Rate Summary Report (“Summary Report”).

Pursuant to the Summary Report, the mean and median rates charged in the Mt. Clemens area are \$232.00 and \$225.00 per hour respectively, the mean and median rates for collection practice are \$225.00 and \$200.00 per hour respectively and the mean and median rates in Macomb County are \$262.00 and \$250.00 per hour respectively. (*See* Summary Report at 5-8.)

Mr. Abramson and Mrs. Abramson testified that they have been practicing law for roughly 30 years. The mean and median rates for an attorney practicing over 35 years are \$279.00 and \$250.00 per hour respectively. (*See* Summary Report at 4.) Mr. Zadoff testified that he has been practicing for 8 to 9 years. The mean and median rates for an attorney practicing between 6-10 years are \$236.00 and \$225.00 per hour respectively.

Based upon the relatively un-complex nature of this matter, and the evidence provided by the Summary Report, the Court is convinced that the requested rate of \$275.00 per hour is an unreasonable rate. Rather, the Court is convinced that the appropriate rates in this matter are \$250.00 per hour for Mr. Abramson and Mrs. Abramson, and \$225.00 per hour for Mr. Zadoff.

The next task before the Court is to determine the reasonable amount of hours expended by Plaintiff’s three counselors.

2) Reasonable Hours

The fee applicant has the burden of supporting their claimed hours with evidentiary support, including detailed billing records, which the opposing party may contest. *Smith, supra*, at 532. However, an itemized bill of costs by itself is insufficient to establish the reasonableness of the hours claimed. *Petterman v Haverhill Farms, Inc.*, 125 Mich App 30, 33; 335 NW2d 710

(1983). The fee applicant must establish by documentary evidence, specific testimony, or both, that the time identified as expended on a bill was actually and reasonably expended. *Id.* at 33.

In this matter, Plaintiff's three attorneys have submitted itemized bills in support of their requests for fees. Further, all three attorneys testified that the services, and corresponding charges, referenced in their bills were actually provided and accurately billed. The Michigan Court of Appeals has held that a trier of fact is not required to accept a bill on its face or the claimant's representation that the hours identified in the bill of costs were reasonably expended. See *Augustine v Allstate Ins. Co.*, 292 Mich App 480, 432; 807 NW2d 77 (2011).

In this case, each of Plaintiff's attorneys testified that they bill at quarter hour increments. While Defendants contend that use of such methodology is unreasonable, they have failed to cite to any binding authority supporting their position. Accordingly, the Court is convinced that Defendants' position is without merit.

Additionally, Defendants contend that many of the entries are fabricated/fictitious. First, Defendants challenge 2-07-15 entries for 3 hours and .25 hours for a hearing. Specifically, Defendants point out that 2-07-15 was a Saturday. Indeed, upon reviewing Defendants' billing records, the Court notes that Mr. Abramson's billing records contains a false 3 hour entry for a hearing on a Saturday. Accordingly, said entry will be stricken.

Next, Defendants contest Mr. Abramson's entry of 2.25 for the February 9, 2015 evidentiary hearing. The February 9, 2015 hearing began at approximately 11 a.m. and concluded at 11:20 a.m. While the Court also notes that counsel for the parties were also required to travel to the hearing and prepare an order following the hearing, the Court is satisfied that the 2.25 hours documented should be reduced to 1 hour.

Additionally, Defendants challenge Mrs. Abramson's entry of 3.25 for a hearing on December 24, 2014. Indeed, the Court was not open on Christmas Eve and no hearing was held on that date. Rather, the hearing referenced in the entry was held on December 22, 2015, and Mrs. Abramson did not make an appearance at that hearing. Consequently, Mrs. Abramson's entry for that date must be stricken.

Next, Defendants challenge Mr. Zadoff's entry of 4.5 hours on December 1, 2014 for attending motion call. The motions in connection with this matter were heard beginning at 9:56 a.m. and was finished at approximately 10:15 a.m. While the Court recognizes that counsel arrived for the hearing at approximately 8:30 a.m., it is nevertheless convinced that Mr. Zadoff's entry is substantially inflated. After reviewing the record for the hearing date, the Court is convinced that the entry should be reduced to 2 hours.

3) *Smith, Wood and MRPC 1.5(A) Factors*

The factors set forth in MRPC 1.5(A), *Smith* and *Wood* are to be addressed after a baseline figure has been established by multiplying the reasonable hours and the reasonable rate. *See Smith, supra*, at 533. For the reasons discussed above, the reasonable rate for Mr. and Mrs. Abramson is \$250.00, and the reasonable rate for Mr. Zadoff is \$225.00 per hour. Further, after the above-referenced deductions to the submitted billing records, the total amount of reasonable hours incurred in connection with the instant matter for each attorney is: Jay A. Abramson- 68.25 hours, Joanna S. Abramson- 30.75 hours, and Jonathan L. Zadoff- 110.5 hours. Accordingly, the Court finds that Plaintiff is entitled recover the following attorney fees: Jay A. Abramson- \$17,062.50, Joanna S. Abramson- \$7,687.50, and Jonathan L. Zadoff- \$24,862.50

With respect to those factors set forth in MRPC 1.5(A), *Smith* and *Wood* that have not already been addressed in connection with section (2) of this Opinion and Order, the parties have

failed to address any particular factor. Consequently, the Court will not adjust the total award in this case based on those factors.

Conclusion

For the reasons set forth above, Plaintiff's motion for entry of judgment is GRANTED, IN PART, and DENIED, IN PART. Plaintiff is awarded \$49,612.50 in attorney fees it has incurred in this matter. Plaintiff's request for attorney fees incurred in Defendant 231's bankruptcy is DENIED.

Plaintiff shall submit a proposed judgment consistent with this Opinion and Order within 28 days of the date of this Opinion and Order. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: March 11, 2015

JCF/sr

Cc: *via e-mail only*

Jay A. Abramson, Attorney at Law, abramson@comcast.net

Scott F. Smith, Attorney at Law, ssmith3352@aol.com

Brian C. Grant, Attorney at Law, bcg@briangrantlaw.com